NO. 82-1960

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

EARL BRENNAN, et al.,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITIONERS' REPLY BRIEF

JERROLD A. FADEM,
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation

Suite 600
501 Santa Monica Boulevard
P.O. Box 2148
Santa Monica, California 90406
(213) 451-9951

Attorneys for Petitioners.

The Brief Shop • Legal Printers • (213) 877-8620

NO. 82-1960

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

EARL BRENNAN, et al.,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITIONERS' REPLY BRIEF

JERROLD A. FADEM,
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation

Suite 600
501 Santa Monica Boulevard
P.O. Box 2148
Santa Monica, California 90406
(213) 451-9951

Attorneys for Petitioners.

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

NO. 82-1960

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

EARL BRENNAN, et al.,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITIONERS' REPLY BRIEF

INTRODUCTION

The City's Brief in Opposition does not dispute the facts, nor the trial court's eventual conclusion that the City's decade long delay in acquiring the subject properties resulted in a de facto taking of property which Constitutionally requires compensation. 1/

1/ The City's factual statement does appear to dwell unduly on an initial trial court ruling (later vacated) that there was no de facto taking. However, as a matter of California procedural law, the second trial judge acted within his power by vacating that holding and making a contrary one. (*City of Los Angeles v. Tilem* [1983] 142 Cal.App.3d 694, 706.) The City's brief also distracts by discussing state law issues not brought here by the Petition.

Nor does the City's Brief dispute the nationally chaotic state of the law as to what constitutes a de facto taking of property in the Constitutional sense, or the California courts' erroneous application of the law developed by this Court.

Rather, the City contends that the federal Constitutional issues were neither raised nor ruled on below.

The City is wrong.

THE FEDERAL CONSTITUTIONAL ISSUES WERE PROPERLY RAISED

State procedure generally governs how Federal questions are to be raised, although as a matter of Federal Constitutional law, no particular form is necessary:

> "[i]f the record as a whole shows *either expressly or by clear intendment* that this was done, the claim is to be regarded as having been adequately presented." (***New York ex rel. Bryant v. Zimmerman*** [1928] 278 U.S. 63, 67; emphasis added.)

With respect to 14th Amendment deprivation of property questions, California has dispensed with the necessity to differentiate between the State and Federal Constitutional guarantees by holding itself bound to apply this Court's rulings in all circumstances:

> "The constitution of California provides that no person shall be deprived of his property without due process of law. (Art. I, § 13.) [Now Art. I, § 19.] This is also declared by the fourteenth

> amendment to the constitution of the United States. *The question whether or not this act operates to deprive persons of property without due process of law, is therefore, a federal question*, upon which the decisions of the supreme court of the United States are controlling authority." (***Brookes v. City of Oakland*** [1911] 160 Cal. 423, 427; emphasis added.)

In conformity with California practice, the Property Owners' initial pleadings alleged that their properties had been taken by the City's actions, without compensation and without due process of law.

When the de facto taking issue was tried, the brief filed by the Property Owners was based heavily on Federal Constitutional law urging that:

(1) A de facto taking occurs when the actions of a government agency severely interfere with an owner's ability to sell or use his property, citing ***Foster v. City of Detroit*** (E.D. Mich. 1966) 254 F.Supp. 655; ***Drakes Bay Land Co. v. United States*** (Ct Cl 1970) 424 F.2d 574; and ***Shoshone Tribe v. United States*** (1936) 299 U.S. 476;

(2) In de facto taking cases, the date of value is the date of the de facto taking, citing ***Foster; Drakes Bay***; and ***Madison Realty v. City of Detroit*** (E.D. Mich. 1970) 315 F.Supp. 367; and

(3) Deprivation of the ability to use property is compensated by awarding interest from the date of deprivation, citing ***Jacobs v. United States*** (1933) 290 U.S. 13; ***United States v. Klamath & Modoc Tribes*** (1937) 304 U.S. 119; ***Smyth v. United States*** (1937) 302 U.S. 329; ***Shoshone Tribe v. United States*** (1936) 299 U.S. 476; ***Seaboard***

Airline R. Co. v. United States (1922) 261 U.S. 299; and *United States v. Rogers* (1920) 255 U.S. 163.

The Property Owners based their right to recover on these arguments and these authorities throughout the litigation — in trial and on appeal.

The Federal Constitutional issues were thus central to the Property Owners' presentation of the case, both through the extensive reliance on Federal law, and through the California Supreme Court's holding in *Brookes* that Federal law is controlling.

THERE IS NO ADEQUATE NON-FEDERAL GROUND FOR THE DECISION

Alternatively, the City suggests that the Petition be denied because the decision below was based on non-Federal grounds:

> "The California Court of Appeal decision was clearly based upon Article I, §19, of the California Constitution and the California Supreme Court decision in *Klopping v. City of Whittier* (1972) 8 Cal.3d 39." (Br. in Opp., p. 10.)

The City is wrong.

First. A decision based on Cal. Const. Art I, §19 is not *independent* from the 14th Amendment. As noted above, the California Supreme Court has held itself bound by this Court's 14th Amendment decisions in property deprivation cases. *(Brookes*, 160 Cal. at 427.) Recent California taking cases show the California Court's continuing attempt

(though not always free from error) to apply this Court's decisions. (*See, e.g., **Agins v. Tiburon*** [1979] 24 Cal.3d 266, 273-275.)

Lack of an *independent* state ground gives this Court jurisdiction. (***Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*** [1917] 243 U.S. 157, 164.)

Second. An interpretation of the California Constitution which deprives the Property Owners of rights guaranteed by the Federal Constitution is a reason to *take* this case, not reject it. (*See, e.g., **Pruneyard Shopping Center v. Robins*** (1980) 447 U.S. 74, 79-80.) In ***Pruneyard***, the California Supreme Court based its decision on Article I, §§ 2 and 3 of the California Constitution. This Court took jurisdiction because that interpretation adversely affected property riqhts protected by the 14th Amendment.

Third. The de facto taking concept of ***Klopping v. City of Whittier*** (1972) 8 Cal.3d 39 was drawn directly from Federal Constitutional jurisprudence, i.e., ***Foster v. City of Detroit*** (E.D. Mich. 1966) 254 F.Supp. 655, aff'd (6th Cir 1968) 405 F.2d 138 (*see **Klopping***, 8 Cal.3d at 46).

Thus, the de facto taking part of ***Klopping***, which was central to the decision below, is not independent of Federal law either.

Finally. It is precisely because California's interpretation of Constitutional precepts conflicts with those made by this Court that jurisdiction appropriately rests in this Court to review the decision. In purported reliance on this Court's rulings, California has:

- concocted a rigid rule requiring physical invasion or legal restraint before a de facto taking may be found, where this Court's *actual* rule rests on flexible examination of all facts;

- held that years of stultification of land use *cannot* result in a taking, creating *direct* conflict with the Ninth Circuit Court of Appeals; and
- denied compensation for unreasonable delay in consummating a taking, in conflict with the theory of numerous decisions of this Court.

The decision below is at least so interwoven with Federal law as not to be independent of it. (***Enterprise Irrig. Dist.***) Review is not only proper, it is necessary to bring California's decisions on Federal Constitutional issues in line with this Court's paramount teachings. (***Pruneyard.***)

CONCLUSION

The City cannot deny the discord between this Court's holdings and the decision below.

The City's lame attempt to forestall review and rectification of the erroneous California position (and resolution of the unseemly nationwide conflict) ought not prevail.

The Property Owners pray that a writ issue.

Respectfully submitted,

JERROLD A. FADEM
MICHAEL M. BERGER
FADEM, BERGER & NORTON
Attorneys for Petitioners